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by Jay E. Grenig

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Editor's Note: The respondent's brief in this case was not available by *PREVIEW*'s deadline.

Issue

Is the Tenth Circuit's interpretation of "original source" in the Federal False Claims Act correct?

Facts

From 1978 through 1989, Rockwell International Corp. (now known as Boeing North American, Inc.) operated the Rocky Flats nuclear weapons plant in Golden, Colorado, for the U.S. Department of Energy under a management and operating contract. Under this arrangement, Rockwell was compensated on a "cost-plus" fee basis. The department reimbursed Rockwell for "allowable costs" incurred in operating the plant. Once a year, Rockwell received a "base fee" calculated at a predetermined percentage of the overall value of the contract. The most significant portion of Rockwell's compensation for its management of Rocky Flats was in the form of an "award fee"—a bonus paid every six months. The amount of the bonus was based on the department's evaluation of Rockwell's performance in such areas as general management, production, and environmental, safety, and health operations.

In 1980, James Stone began working at Rocky Flats as a principal engineer in the Facility's engineering and construction division. He was later promoted to lead principal engineer. In March 1986, Stone was laid off.

On June 25, 1986, Stone informed the FBI about environmental crimes that had allegedly occurred at Rocky Flats while Stone worked there. Stone claimed that Rocky Flats accepted hazardous and nuclear waste from other department facilities; that Rockwell employees were forbidden from discussing any controversies in front of department employees; that although Rocky Flats' fluid bed incinerators had failed testing in 1981, the pilot incinerator remained

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ROCKWELL INTERNATIONAL CORP. ET AL. V. UNITED STATES ET AL.
DOCKET NO 05-1272

ARGUMENT DATE:
DECEMBER 5, 2006
FROM: THE TENTH CIRCUIT

Case at a Glance

Two decades ago, a former engineer at a nuclear weapons facility reported alleged fraudulent activity by a contractor at the facility. The engineer subsequently brought suit against the contractor. The contractor claims the engineer was not entitled to bring the suit because he was not an "original source" under the federal False Claims Act.

on line and had been used to incinerate waste daily since 1981, including plutonium waste that was then sent out for burial; that Rockwell distilled and fractionated various oils and solvents from wastes geared for incineration; that Stone believed the ground water was contaminated from previous waste burial; and that hazardous waste lagoons tended to overflow during and after a good rain, causing hazardous wastes to be discharged before treatment.

After the FBI obtained a search warrant, seventy-five FBI and Environmental Protection Agency agents conducted a search of Rocky Flats. Three days after the search, the FBI's affidavit submitted to obtain the search warrant was unsealed, prompting extensive media coverage. Denver newspapers reported that Rocky Flats had illegally burned and dumped waste.

On July 5, 1989, Stone filed a *qui tam* action under the False Claims Act (FCA), alleging that Rockwell, while managing Rocky Flats, concealed environmental, safety, and health problems from the department throughout the 1980s. Stone alleged that Rockwell had violated numerous federal and state laws and regulations "[i]n order to induce the government to make payments or approvals" by knowingly presenting, or causing presentation of, false and fraudulent claims for payment or approval to an officer or employee of the United States government. These claims included requests for statements for payment, statements for reimbursement of costs, and applications for bonuses. Stone also alleged that Rockwell knowingly made, used, or caused to be made or used, false records or statements for the purpose of obtaining approval and payment of these monies. Stone gave the government notice of the complaint, but the United States declined to intervene, although it reserved the right to do so at a later date upon a showing of good cause.

In March 1992, while Stone's FCA claim was proceeding, Rockwell and the United States entered into a plea agreement to conclude a separate criminal investigation into Rockwell's management of Rocky Flats. Rockwell pled guilty to ten environmental violations and admitted knowledge of storage and treatment of mixed hazardous wastes without a permit or interim status and negligent violation of the Clean Water Act permit conditions. As part of its plea, Rockwell agreed to pay $18.5 million in fines.

In December 1992, Rockwell filed a motion to dismiss Stone's complaint on the ground that Stone failed to satisfy the FCA's requirement that he be an "original source." On February 2, 1994, the trial judge denied Rockwell's motion to dismiss, finding that "Mr. Stone had direct and independent knowledge that Rockwell's compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments," and that Stone had also made the requisite disclosure of the relevant information to the government before filing his action.

On November 14, 1995, the United States moved to intervene with respect to some, but not all of Stone's FCA allegations. On November 19, 1996, the trial court granted the motion to intervene. In response to a suggestion from the trial judge, the United States and Stone amended the complaint to state six counts against Rockwell: Count One—a claim under the FCA brought by both the United States and Stone; Counts Two through Five—claims for common law fraud, breach of contract, payment by mistake of fact, and unjust enrichment brought by the United States alone; Count Six—a claim under the FCA alleging Rockwell knowingly presented or caused to be presented to the government false or fraudulent claims for money or property brought by Stone alone.

A jury trial was held on Counts One through Five. The verdict form asked the jury to answer the question: "Did the plaintiffs prove by a preponderance of the evidence that the defendant Rockwell International Corporation violated the False Claims Act to get one or more of the following claims under the Department of Energy-Rockwell contracts paid or approved?" The verdict form required the jury to answer that question for each of ten six-month periods running from October 1, 1986, through December 30, 1989, each corresponding to an "Award Fee Period" or a period for which Rockwell received "Vouchers Accounting for Net Expenditures Accrued."

The jury returned verdicts for Rockwell on the breach of contract claim and on seven of the ten FCA claims in Count One. The jury found for the plaintiffs on the three remaining FCA claims and awarded $1,390,775.80 in damages. After the jury verdict, the plaintiffs tendered a proposed form of judgment that included Stone as a party in whose favor judgment should be entered, in accordance with the principles of a *qui tam* action. Rockwell then filed a post-trial memorandum arguing that Stone was not an "original source" and thus was not entitled to have judgment entered in his favor or to recover attorney's fees and expenses. The trial judge rejected Rockwell's argument. On June 10, 1999, the district court entered judgment in favor of the plaintiffs on the three FCA claims in the

amount of $4,172,327 (treble damages are permitted under the FCA). The court also awarded the United States a $15,000 civil penalty under the FCA.

Rockwell appealed, arguing that, among other things, the trial court erred in finding that Stone was an original source of the information on which the FCA allegations were based with respect to claims regarding the allegedly faulty process for manufacturing pondcrete. Pondcrete is manufactured by mixing sludge from solar evaporation ponds with Portland cement, pouring the mixture into large boxes, and allowing it to solidify. The plaintiffs had argued that the pondcrete blocks at Rocky Flats failed to solidify because Rockwell employees cut the amount of cement being added to the mixture.

A divided three-judge panel of the Tenth Circuit held that Stone had satisfied the statutory requirement of disclosure *United States ex rel. Stone v. Rockwell Int'l Corp.*, 92 Fed. Appx. 708 (10th Cir. 2004).

Ruling that Stone was an "original source" within the meaning of the FCA, the Tenth Circuit held Stone had adduced sufficient competent proof to establish that he had direct and independent knowledge of the information on which his FCA claim was based. The Tenth Circuit said that review of the record convinced it that Stone had been specific and detailed in showing how he obtained, through his own efforts and not through the labors of others, direct and independent knowledge that Rockwell's designs for manufacturing pondcrete blocks would result in the release of toxic waste.

The court pointed out that Stone had supplied the trial court with an affidavit detailing his duties and responsibilities at Rocky Flats and describing the observations underpinning his FCA action. In his affidavit, Stone declared that he had communicated his concerns about the pondcrete manufacturing process to Rockwell's management in an engineering order dated October 13, 1982. The engineering order explicitly articulated Stone's belief that the proposed design for making pondcrete was flawed and suggested a pilot operation be designed to simplify and optimize each phase of the operation. The Tenth Circuit noted that, despite Stone's warning, Rockwell went forward and manufactured pondcrete using the allegedly deficient procedure.

The Tenth Circuit found it significant that Stone provided a confidential disclosure statement dated July 5, 1989, to the government, detailing how he became aware of Rockwell's allegedly faulty process for manufacturing pondcrete. Moreover, the court noted that in his disclosure statement, Stone described how Rockwell had forbidden him from discussing any environmental problems at Rock Flats with the Department of Energy.

The court stated that the information from Stone was sufficiently specific to satisfy the standard for an "original source" set out in the FCA. The court determined that Stone had clearly articulated in his affidavit and disclosure statement that he had learned the facts underlying his claim by reviewing Rockwell's plans for producing pondcrete. Thus, the court said Stone had sufficiently alleged specific facts—as opposed to mere conclusions—showing exactly how and when he had obtained direct and independent knowledge of the fraudulent acts alleged in the complaint and supported those allegations with competent proof.

The Tenth Circuit rejected Rockwell's argument that Stone must have direct and independent knowledge of the actual fraudulent submission to the government. The court stated that, for Stone to be an original source, Stone need only possess "direct and independent knowledge of the information on which the allegations are based." The court explained that the phrase "information on which the allegations are based" means "the information underlying or supporting the fraud allegations contained in the plaintiff's *qui tam* complaint." The court said there was a distinction between the actual act of fraud and the facts underlying or giving rise to the fraud.

According to the Tenth Circuit, Stone was not required to have knowledge of the fraudulent conduct itself; knowledge underlying or supporting the fraud allegation is sufficient. The court concluded that Stone's knowledge that a defective pondcrete manufacturing process would be employed, gained from his review of Rockwell's plans, constituted knowledge of information "underlying or supporting" his allegation concerning Rockwell's alleged ultimate fraudulent activity—the submission of claims to the Department of Energy falsely stating that Rocky Flats was in compliance with environmental, health, and safety laws.

The court also rejected Rockwell's argument that Stone could not be an original source for the pondcrete claim because he no longer worked at Rocky Flats when the manufacture of pondcrete blocks commenced. The court reasoned that the gravamen of Stone's claim was that he learned from studying Rockwell's plans for manufacturing that the blocks would leak toxic waste. The court said the fact that

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Stone was not physically present at Rocky Flats when production began was immaterial to the relevant question—whether Stone had direct and independent knowledge of the information underlying his claim.

The court did not find persuasive Rockwell's argument that Stone could not have had direct and independent knowledge of the information on which his pondcrete claim was based because it is preposterous to think the alleged defects in design Stone identified in his review of the designs later caused solidity defects in the pondcrete blocks. Declaring that whether the alleged design flaws noted by Stone in his engineering report actually caused the production of malformed pondcrete blocks was immaterial, the court said that the issue of whether a claim is ultimately flawed on the merits is for the finder of fact to determine.

The Tenth Circuit also ruled that Stone had satisfied the requirement that he disclose the information underlying his claims to the government before bringing suit against Rockwell. The court found that Stone had produced a document in his confidential disclosure Statement on which he had stated his belief that the proposed design form making the pondcrete was flawed, and that the document had been produced to the government before suit was filed.

The dissenting judge asserted that Stone could not establish that he qualified as an original source. Acknowledging that Stone had accurately predicted in a 1982 engineering order that Rockwell's proposed design for making pondcrete would not work, the judge explained there was no evidence that Stone directly and independently knew that Rockwell actually experienced problems when it began producing pondcrete or that Rockwell concealed the resulting environmental problems from the Department of Energy.

On September 26, 2006, the Supreme Court granted Rockwell's petition for a writ of certiorari limited to the question of whether the Tenth Circuit erred by affirming the entry of judgment in favor of James Stone, who was a *qui tam* relator under the FCA, based on a misinterpretation of the statutory definition of an "original source" as set forth in 31 U.S.C. § 3730(e)(4). 127 S.Ct. 35 (2006).

Case Analysis

Originally enacted in 1863, the Federal False Claims Act (31 U.S.C. § 3729 et seq.) imposes civil liability upon any person who, among other things, knowingly presents or causes to be presented to an officer or employee of the United States government a false or fraudulent claim for payment or approval. The defendant is liable for up to treble damages and a civil penalty of up to $15,000 per claim.

An FCA action may be commenced in one of two ways. First, the government may bring an action under § 3730(a) against the alleged false claimant. Second, under § 3730(b), a private person (the relator) may bring a civil action known as a *qui tam* action "for the person and for the United States Government" against the alleged false claimant "in the name of the government." (*Qui tam* is an abbreviation for the Latin phrase *qui tam pro domine nege qua pro sic ipso in hoc sequitur,* meaning "who pursues this action on our Lord the King's behalf as well as his own." It is called a *qui tam* action because the plaintiff states that he sues for the government and for himself.) The relator receives a share of any proceedings from the action—generally between 15 percent to 25 percent if the government intervenes in the action and from 25 percent to 30 percent if it does not.

A "claim" means any request or demand, whether under a contract or otherwise, for money or property that is made to a contractor, grantee, or other recipient if the United States government provides any portion of the money or property that is requested or demanded. The FCA reaches beyond claims that might be legally enforced to all fraudulent attempts to cause the government to pay out sums of money.

In 1943, the Supreme Court held an individual could bring a *qui tam* action even if the individual had contributed nothing to the discovery of the fraud. *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 545-46 (1943). Congress subsequently amended the False Claims Act to provide that a court "shall have no jurisdiction to proceed with any such [*qui tam*] suit ... whenever it shall be made to appear that such suit was based upon evidence in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."

In 1984, the Supreme Court held that a state's *qui tam* action was barred because the state had provided the government with reports about the defendant's fraudulent activity as required by law before filing the action. Thereafter, Congress amended the FCA to provide that no court shall have jurisdiction over a *qui tam* action based on public information unless "the person bringing the action is an original source of the information." The FCA defines an "original source" as "an individual who has direct and independent knowledge of the information on which the

allegations are based and who has voluntarily provided the information to the government before filing an action under this section which is based on the information."

Rockwell argues that what it calls the "Tenth Circuit's expansive interpretation of the original source exception" cannot be reconciled with the significant limitations Congress imposed on *qui tam* suits. Rockwell reasons that the need for *qui tam* actions is at its lowest ebb when enough information has been publicly revealed to put both the government and the public on notice that a fraud may have been committed. According to Rockwell, at that point, the government can compel would-be relators to cooperate without the need for a promise of a bounty.

Rockwell asserts that through amendments to the FCA, Congress sought to achieve the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information of their own to contribute. Rockwell says an expansive reading of the original source exception would disrupt the careful balance that Congress sought to achieve.

It is Rockwell's position that the Tenth Circuit erroneously held that Stone had "direct and independent knowledge of the information on which the allegations" were based. According to Rockwell, no other circuit besides the Tenth has allowed a relator to escape the public disclosure bar "with merely some information 'underlying or supporting' his fraud allegations.'"

Rockwell explains that the FCA first requires a court to identify the core information on which the allegations of the relator's FCA action are based in order to assess the sufficiency of the relator's knowledge of that information. Rockwell claims that the information Stone claimed to have known was woefully inadequate to qualify him as an original source. Rockwell also asserts that Stone abandoned his original theory of the cause of the pondcrete problems and asserted a new theory that was inconsistent with Stone's supposed "direct and independent" knowledge. Rockwell says that Congress did not intend for courts to assess a relator's original source status merely by reviewing the allegations contained in a superseded initial complaint.

Second, Rockwell argues that a court must determine whether the relator's knowledge of the relevant information is "direct and independent." Declaring that the information must not depend or rely on the public disclosures and must be first-hand knowledge, Rockwell asserts that the Tenth Circuit erroneously held that Stone's "highly inferential predictions of inferences of future events" qualified as "direct knowledge."

Third, Rockwell says a court must determine if the relator's "direct and independent knowledge" is sufficient. Rockwell contends the Tenth Circuit embraced a loose requirement that a relator must simply have direct and independent knowledge of some "information underlying or supporting the fraud allegations." Rockwell says the Tenth Circuit's interpretation is inconsistent with the basic requirements imposed by other circuits that the relator's knowledge must be knowledge of the particular fraud.

According to Rockwell, Stone cannot qualify as an original source under any reasonable interpretation of the FCA. Rockwell claims that the record overwhelmingly demonstrates that Stone did not have direct and independent knowledge sufficient to show either the false statements on which his action was based or the actual facts rendering those statements false. Rockwell says that Stone did not have any information that was "essential," "substantive," or "core" to establishing those issues.

Noting that an original source must have "voluntarily provided the information to the government before filing an action" under the FCA, Rockwell argues that Stone failed to provide sufficient information to the government. According to Rockwell, Stone's engineering order did not contain sufficient information to satisfy the requirements of the FCA.

SIGNIFICANCE

The Eighth, Tenth, and D.C. Circuits have held that the FCA does not require that a *qui tam* relator possess direct and independent knowledge of all the vital ingredients to a fraudulent transaction. See *United States ex rel. Springfield Terminal Ry. V. Quinn,* 14 F.3d 645 (D.C. Cir. 1994); *United States ex rel. King v. Hillcress Health Center, Inc.,* 264 F.3d 1271 (10th Cir. 2001); *United States ex rel. Minnesota Ass'n of Nurse Anesthetists v. Allina Health Systems Corp.,* 276 F.3d 1032 (8th Cir. 2002). The Third Circuit in *United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh,* 186 F.3d 376 (3d Cir. 1999), held that in order to qualify as an "original source," the relator must have first-hand knowledge about "the most critical element of its claims, *viz.,* that the Authority had made the alleged misrepresentations to HUD" regarding its paint abatement program.

The Tenth and D.C. Circuits qualify a relator as an original source if the relator has sufficient knowledge of either the statement to the govern-

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ment or the true state of affairs showing it to be false. The Eighth Circuit requires only knowledge of falsity.

The Second and Ninth Circuits have held that a relator must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based. *United States ex rel. Dick v. Long Island Lighting Co.,* 912 F.2d 13 (2d Cir. 1990); *United States ex rel. Wang v. FMC Corp.,* 975 F.1d 1412 (9th Cir. 1992). Other circuits have rejected that view. See, e.g., *United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh,* 186 F.3d 376 (3d Cir. 1999).

A decision affirming the Tenth Circuit may make it easier for individuals bringing *qui tam* suits to establish that a court has subject matter jurisdiction. A decision reversing the Tenth Circuit may reduce the incentives for whistleblowing insiders with information to make the information public. However, a reversal may also discourage opportunistic plaintiffs who have no significant information to contribute of their own from bringing *qui tam* suits.

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Amicus Briefs (as of November 17, 2006)

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American Hospital Association et al. (Catherine E. Stetson (202) 637-5491)

BP America Production Co. et al. (Donald Earl Childress III (202) 879-3939)

Chamber of Commerce of the United States et al. (Herbert L. Fenster (202) 496-7500)

Comstock Resources, Inc. (William Scott Hastings (214) 740-8000)

National Defense Industrial Association (Alan A. Pemberton (202) 662-6000)

Washington Legal Foundation et al. (Alan I. Horowitz (202) 626-5800)